

15 U.S.C. § 1635(a)
15 U.S.C. § 1635(e)
15 U.S.C. § 1635(f)
15 U.S.C. § 1640(e)
Fed. R. Bankr. Proc. 9024
Fed. R. Civ. Proc. 60(b)
Truth-in-Lending-Act
Motion for Reconsideration

Smith v. Western Bank of Chinook

B.A.P. #s
OR-98-1499-RRyK
OR-99-1563-RRyK
(consolidated)

In re Smith

Bankr. Main Case # 697-
6218
3-
aer13

10/11/00 (Amended Memorandum Opinion) B.A.P.
Unpublished
(affirming Radcliffe-underlying separate
letter opinions for each appeal)

In 1986, Debtor and Creditor entered into a loan secured by a deed of trust on real property. The loan was revised (refinanced) in 1995. Creditor gave Debtor a Truth-in-Lending Act (TILA) disclosure statement in connection with the revision. Debtor filed Chapter 13 in 1997 and objected to Creditor's secured claim. The objection, among other things, sought rescission and damages under TILA. While the objection was pending, Debtor obtained confirmation of an amended plan, which treated Creditor as secured. She then moved to reconsider the confirmation order. The motion to reconsider was made outside the 10 day period for filing a notice of appeal. The bankruptcy court denied the motion. Later, at the conclusion of the claims litigation, the court overruled the claims objection seeking rescission based on the preclusive effect of confirmation, and the doctrine of "election of remedies". It also overruled the portion of the objection seeking damages on statute of limitations grounds. It allowed the secured claim for \$102,669.89 plus interest.

Debtor appealed both the order denying the motion to reconsider the confirmation order, and the order allowing the claim as secured. The appeals were consolidated. Her main case was later converted to Ch. 7.

On appeal: Affirmed:

Re: Order Denying Motion to Reconsider: Because the motion

was outside the 10 day period for filing a notice of appeal of the confirmation order, it was treated as a motion for relief from judgment under Fed. R. Civ. Proc. 60(b) (made applicable by Fed. R. Bankr. Proc. 9024). Because Debtor alleged none of the grounds enumerated in Rule 60(b) to set aside the confirmation order, the bankruptcy court did not abuse its discretion in denying the motion.

Re: Order Allowing Secured Claim:

A. TILA Rescission: TILA allows rescission of certain consumer transactions secured by a principal residence, up until 3 days from consummation of the transaction or the time certain disclosures are made, whichever is later, 15 U.S.C. 1635(a), but in no case more than 3 years from consummation of the transaction. 15 U.S.C. § 1635(f). Under Supreme Court authority, the 3 year period applies equally to claims asserted offensively, or defensively (as here). Because the underlying transaction took place in 1986, Debtor's rescission claim was time-barred. Furthermore, under 15 U.S.C. § 1635(e)(2), Debtor's rescission rights did not apply to the transaction of which she complained, i.e. the 1995 revision, as that subsection exempts from the right to rescind, a refinancing by the same creditor when the same security is retained, as was the case at bar.

B. TILA Civil Damages: Debtor's claim for civil damages under TILA was barred by 15 U.S.C. § 1640(e)'s one year statute of limitations.

C. Interest On Secured Claim: In response to Debtor's argument that the confirmed plan determined the interest allowable on the secured claim, the court noted that the confirmed plan did not put Western on notice that it was her intention to limit interest on its claim.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re)
GERALDINE KAY SMITH,)
Debtor.) BAP Nos. OR-98-1499-RRyK
(consolidated)
Bk. No. 697-62183-aer13
GERALDINE KAY SMITH,)
Appellant,)
v.) AMENDED MEMORANDUM¹
WESTERN BANK OF CHINOOK,)
N.A.; FRED G. LONG,)
Chapter 13 Trustee,)
Appellees.)

FILED

OCT 11 2000

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

Argued and Submitted on May 16, 2000
at Pasadena, California

Memorandum Filed - June 9, 2000
Amended Memorandum Filed - October 11, 2000

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: RUSSELL, RYAN, and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1 and 9th Cir. Rule 36-3.

E00-14(11)

1 The appellant untimely moved for reconsideration of an
2 order confirming her chapter 13² plan. The bankruptcy court
3 denied her motion and she timely appealed. Her untimely motion
4 for reconsideration resulted in our issuance of an order
5 limiting her appeal to the issues raised by the court's denial.
6 She subsequently appealed from an order allowing the appellee a
7 secured claim. The appeals were consolidated. We AFFIRM.

8 **I. FACTS³**

9 In January 1986, appellant Geraldine Kay Smith completed a
10 loan application with appellee Western Bank. The loan was
11 approved and in March 1986, Smith executed a five-year
12 promissory note for \$135,000 at 12.75% interest. The note was
13 secured by a deed of trust on Smith's real property. The note
14 was revised in December 1990 and again in May 1992.

15 In September 1995, the note was revised for a third time
16 when Smith executed a "Revision or Extension Agreement." This
17 agreement amended the terms of the 1986 note and, in particular,
18 changed the interest rate to 9.375% variable. It also assessed
19 Smith a finance charge of \$525.00. The deed of trust was
20 modified to reflect the revised note and, in connection with the
21

22 ² Unless otherwise indicated, all chapter, section, and
23 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330
24 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

25 ³ Because the procedural posture of this appeal is not
26 clear from the parties' briefs, we have drawn from the bankruptcy
court's version, which is supported by the various pleadings
contained in the record.

1 revision, Western provided Smith with a "Federal Truth-in-
2 Lending Disclosure Statement." Smith made monthly payments
3 under the revised note through June 1996.

4 Smith filed her chapter 13 petition in April 1997. Western
5 filed a proof of claim in the amount of \$128,317.91 to which
6 Smith objected. In December 1997, Western requested a hearing
7 on Smith's objection and later that month, amended its claim, to
8 which Smith again objected. This objection, as well as
9 confirmation of Smith's twice-modified chapter 13 plan, was
10 heard in January 1998. At the hearing, the parties announced a
11 settlement of the claim dispute, which was to be memorialized in
12 an amended proof of claim. Additionally, Smith's chapter 13
13 plan, with substantial amendments to be made in the confirmation
14 order, was confirmed.

15 At some point, the "settlement" collapsed. In February
16 1998, Western filed a second amended proof of claim to which the
17 debtor objected. The confirmation order, with amendments, was
18 entered in March 1998. The order gave Western fifteen days to
19 object to its terms. Western promptly objected to certain
20 language of the order and suggested revisions.

21 Smith then began making inquiries into the accuracy of the
22 Truth-in-Lending Act ("TILA") disclosures made by Western. She
23 specifically asked Western's counsel whether the "cost of
24 credit" made per the 1995 revision was accurate. Smith stated
25 that she needed resolution of this matter before she could
26 stipulate as to the amount of Western's claim. In response to

1 Smith's inquiries, Western conducted an inquiry and determined
2 that TILA might have been violated in the 1995 revision by
3 virtue of an underestimation of the finance charge in the amount
4 of \$525.00.

5 In April 1998, Western executed a check for \$654.58 to
6 Smith. The transmittal letter denied TILA liability and
7 indicated that the check was being delivered to avoid any
8 appearance of impropriety in connection with the 1995 revision.
9 The letter noted that if a mistake had been made on the
10 disclosure statement, it would have been in the amount of
11 \$525.00. It also indicated that the check amount included this
12 figure plus the appropriate interest.

13 A hearing was held on April 29, 1998 on Smith's objection
14 to Western's second amended proof of claim and on Western's
15 objection to the confirmation order. At the hearing, Smith
16 voiced, for the first time, objections based on TILA violations.
17 The bankruptcy court ordered Western to file a third amended
18 proof of claim within thirty days and gave Smith twenty days
19 thereafter to object based on calculation errors or TILA
20 violations. The court also sustained Western's objections to
21 the confirmation order, entering a new order on May 19, 1998 in
22 which Western was treated as a secured creditor.

23 On June 3, 1998, Smith filed "Debtor's Objection to Western
24 Bank's Proposed Plan for Debtor and Motion for Reconsideration
25 of Western Bank's Proposed Plan for the Debtor." On June 5,
26 1998, the court denied Smith's objection and motion for

1 reconsideration, leaving in effect the confirmation order
2 entered on May 19, 1998. Smith filed a notice of appeal of the
3 order denying reconsideration on June 15, 1998. Smith timely
4 appealed the motion for reconsideration. However, the motion
5 for reconsideration was not timely because it was filed more
6 than ten days beyond the court's entry of the confirmation
7 order. As an untimely motion for reconsideration does not toll
8 an appellant's time to appeal the underlying order, we issued an
9 order limiting Smith's appeal to the issues raised by the denial
10 of her motion for reconsideration. Smith requested that we
11 reconsider the order limiting the appeal and her motion was
12 denied in an order issued in March 1999.

13 During this procedural timeline, the matter of Western's
14 claim proceeded. Western timely filed its third amended proof
15 of claim in the amount of \$106,130.26 to which Smith objected.
16 At a hearing held on June 11, 1998, the court disallowed all
17 grounds for objection except those under TILA and ordered a
18 briefing schedule as to the TILA claims. Smith argued that she
19 was entitled to rescind the 1995 revision. Western responded
20 that rescission was unavailable because the 1995 revision was a
21 "refinancing" and the 1986 loan was a residential mortgage
22 transaction, both of which were exempted from TILA's rescission
23 provision. In its findings dated November 1998, the court
24 raised sua sponte the threshold issue of whether Smith's pending
25 TILA rescission claim was barred by the theories of res
26 judicata, collateral estoppel, or election of remedies, as well

1 as by operation of Smith's confirmed plan, which treated Western
2 as a secured creditor. The court tentatively held that the
3 claim was barred, but gave the parties time to brief the issues,
4 which they did. In further findings dated May 1999, the court
5 finalized its tentative ruling.

6 In July 1999, the court entered its order allowing Western
7 a secured claim in the amount of \$102,669.89 plus interest and
8 an unsecured claim in the amount of \$3,460.37. Smith timely
9 appealed. She requested consolidation with her first appeal,
10 which we granted in an order issued in October 1999. Her
11 bankruptcy case was later converted to chapter 7.

12 II. ISSUES

13 A. Whether the bankruptcy court abused its discretion in
14 denying the appellant's motion for reconsideration of the order
15 confirming her chapter 13 plan.

16 B. Whether the bankruptcy court erred in allowing the
17 secured claim⁴ of appellee Western Bank.

18 III. STANDARD OF REVIEW

19 We review the denial of a motion to reconsider for an abuse
20 of discretion. See In re Audre, Inc., 216 B.R. 19, 25 (9th Cir.
21 BAP 1997) (citing In re Ankeny, 184 B.R. 64, 68 (9th Cir. BAP
22 1995)). A bankruptcy court abuses its discretion "when it
23 bases its decision on an erroneous view of the law or a clearly
24 erroneous view of the facts.'" In re Cogar, 210 B.R. 803, 808
25

26 ⁴ The unsecured claim is not contested in these appeals.

1 (9th Cir. BAP 1997) (quoting Lewis v. Telephone Employees Credit
2 Union, 87 F.3d 1537, 1557 (9th Cir. 1996)).

3 Whether the court erred in allowing the secured claim of
4 appellee Western Bank involves the propriety of its ruling on
5 the availability of the claim of rescission, which is a question
6 of law. We review questions of law de novo. See In re
7 Robinson, 241 B.R. 447, 448 (9th Cir. BAP 1999) (citing In re
8 Osworth, 234 B.R. 497, 498 (9th Cir. BAP 1999)).

9 IV. DISCUSSION

10 A. The Motion for Reconsideration

11 Where the time for appeal has expired, as it had in this
12 case, a motion for reconsideration is treated as a motion for
13 relief from a judgment under Federal Rule of Civil Procedure
14 60(b). See In re Negrete, 183 B.R. 195, 197 (9th Cir. BAP
15 1995), aff'd mem., 103 F.3d 139 (9th Cir. 1996) (citing In re
16 Cleanmaster Indus., Inc., 106 B.R. 628, 630 (9th Cir. BAP
17 1989)). Federal Rule of Bankruptcy Procedure 9024 makes Rule
18 60(b) applicable to bankruptcy cases. Rule 60(b) provides that
19 there may be relief from a judgment or order for the following
20 reasons:

21 (1) mistake, inadvertence, surprise, or
22 excusable neglect; (2) newly discovered
23 evidence which by due diligence could not
24 have been discovered in time to move for a
25 new trial under Rule 59(b); (3) fraud
(whether heretofore denominated intrinsic or
26 extrinsic), misrepresentation, or other
misconduct of an adverse party; (4) the
judgment is void; (5) the judgment has been
satisfied, released, or discharged, or a
prior judgment upon which it is based has

been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Smith has alleged none of the standards enumerated in Rule 60(b) in her motion for reconsideration. She asserts no mistake, newly discovered evidence, or fraud, and merely revisits issues already ruled upon by the bankruptcy court in confirming the plan. As we held in Negrete, a motion for reconsideration is not a proper substitute for a timely notice of appeal. See Negrete, 183 B.R. at 198. In Negrete, we concluded that the reconsideration motion attempted to revisit the underlying order without appropriate justification under Rule 60(b). Id.

This conclusion applies with equal force here. Though we construe Smith's motion for reconsideration as a Rule 60(b) motion, it contains no basis for relief under the Rule. Thus, the court did not abuse its discretion in denying the motion.

B. Western Bank's Secured Claim

Smith argues on appeal that the bankruptcy court erred in allowing Western Bank's secured claim because she had the right to rescind her loan from Western for alleged violations of the federal Truth-in-Lending Act.⁵ We disagree.

5 Apart from rescission, Smith also sought civil damages for the alleged TILA violations. As the bankruptcy court properly observed, Smith's claim was barred by the statute of limitations contained in 15 U.S.C. § 1640(e), which states in pertinent part:

(continued...)

1 Smith's ability to rescind under TILA is governed by 15
2 U.S.C. § 1635. Section 1635(a) provides:

3 [I]n the case of any consumer credit
4 transaction . . . in which a security
5 interest, including any such interest
6 arising by operation of law, is or will be
7 retained or acquired in any property which
8 is used as the principal dwelling of the
9 person to whom credit is extended, the
10 obligor shall have the right to rescind the
11 transaction until midnight of the third
12 business day following the consummation of
13 the transaction or the delivery of the
14 information and rescission forms required
15 under this section together with a statement
16 containing the material disclosures required
17 under this subchapter, whichever is later
18

12 Under § 1635(b), rescission voids the creditor's security
13 interest and normally "undoes" the contractual relationship
14 between the parties.

15 Rescission rights under § 1635(a), however, are limited by
16 the time restrictions set forth in § 1635(f), which provides:

17 An obligor's right of rescission shall
18 expire three years after the date of
19 consummation of the transaction or upon the
20 sale of the property, whichever occurs
21 first, notwithstanding the fact that the
22 information and forms required under this
23 section or any other disclosures required
24 under this part have not been delivered to
25 the obligor

22 It is undisputed that Smith entered into the loan transaction

24
25 ⁵(...continued)

25 "Any action under this section may be brought in any United States
26 district court, or in any other court of competent jurisdiction,
within one year from the date of the occurrence of the violation."

1 with Western in March 1986, at which time Western received a
2 security interest in Smith's principal dwelling to secure
3 repayment. Thus, her right of rescission expired in March 1989,
4 nine years before she first asserted it. Reinforcing this
5 conclusion is a recent Supreme Court opinion in which the Court
6 stated that TILA "permits no federal right to rescind,
7 defensively or otherwise, after the 3-year period of § 1635(f)
8 has run." Beach v. Ocwen Fed. Bank, 523 U.S. 410, 419 (1998).

9 In any event, rescission rights do not apply to the
10 specific transaction of which Smith complains—the 1995 revision
11 to her loan in which Western allegedly failed to make certain
12 disclosures required by TILA. Section 1635(e) exempts certain
13 transactions from the right of rescission, including those
14 "which constitute[] a refinancing or consolidation (with no new
15 advances) of the principal balance then due and any accrued and
16 unpaid finance charges of an existing extension of credit by the
17 same creditor secured by an interest in the same property." 15
18 U.S.C. § 1635(e)(2). The 1995 revision was exactly such a
19 transaction. It refinanced the existing principal balance of
20 the original loan transaction, involved the original lender, and
21 was secured by an interest in the same property. Thus, it
22 cannot serve as the basis for rescission, as Smith urges. We
23 hold that the remedy of rescission was not available to Smith.⁶

25 ⁶ Western argues this point on additional grounds,
26 including res judicata, collateral estoppel, and election of
(continued...)

Our determination that rescission was precluded negates Smith's basis for her argument that the bankruptcy court erred in allowing Western's secured claim. Thus, the court did not err in allowing the claim, which, in light of Western's oversecured status, properly included interest pursuant to § 506(b).⁷

V. CONCLUSION

Smith's appeal concerning the confirmation order was limited to the motion for reconsideration of that order. Because she failed to satisfy the requirements of Federal Rule of Civil Procedure 60(b), the bankruptcy court did not abuse its discretion in denying it.

Because Smith had no right to rescind any of the loan transactions with Western, the court did not err in allowing Western's secured claim. We AFFIRM.

⁶(...continued)

remedies. Given the determinative nature of the above analysis, however, it is unnecessary to address them.

7 Smith argues that for Western to receive interest, her confirmed plan must provide for it. Without deciding whether, under appropriate circumstances, a confirmed plan would have preclusive effect as to whether interest would be paid on a claim, we note that Smith's confirmed plan did not put Western on notice that it was her intention to limit interest on its claim.